UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEBRASKALAND, INC.

and

Case No. 2-CA-39996

LOCAL 342, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

NEBRASKALAND, INC.'S ANSWERING BRIEF TO ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE BOARD

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Respondent Nebraskaland, Inc., pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, submits its Answering Brief to the Exceptions filed by the Counsel for the Acting General Counsel, Region 2.

STATEMENT OF THE CASE

Nebraskaland, Inc. ("Respondent" or "Nebraskaland") and United Food & Commercial Workers, Local 342 ("Local 342" or "Union") entered into a collective bargaining agreement ("CBA") that expired pursuant to its terms on October 31, 2009. The parties have engaged in negotiations for a successor agreement but, to date, none has been reached. On April 2, 2010, the Respondent ceased dues checkoff for Local 342 members in accordance with long standing board precedent. Administrative Law Judge Steven Davis ("ALJ") concluded that this did not violate Section 8(a)(5), 29 U.S.C. § 158(a)(5), and Section 8(a)(1), 29 U.S.C. § 158(a)(1) of the National Labor Relations Act, 29 U.S.C. §§ 151-69 (hereinafter the "Act"), based on the Board's current law on this issue as stated in Hacienda III.[1] (See ALJD, p. 5).[2] As a result, the Complaint was dismissed.

Acting General Counsel takes exception to the ALJ's decision, which enforced fifty years of Board precedent set forth in Bethlehem Steel Co. (New York, N.Y.), 136 NLRB

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[1] For clarity of reference, we will use the same identifiers for these cases as used by the Acting General Counsel in its brief: Hacienda Hotel, Inc. Gaming Corp. (Hacienda I), 331 NLRB 665 (2000), vacated by Local Joint Executive Bd. of Las Vegas v. NLRB (LJEB I), 309 F.3d 578 (9th Cir. 2002); Hacienda Hotel, Inc. Gaming Corp. (Hacienda II), 351 NLRB 504 (2007), vacated by Local Joint Executive Bd. of Las Vegas v. NLRB (LJEB II), 540 F.3d 1072 (9th Cir. 2008); Hacienda Hotel, Inc. Gaming Corp. (Hacienda III), 355 NLRB No. 154 (2010), vacated by Local Joint Executive Bd. of Las Vegas v. NLRB (LJEB III), 657 F.3d 865 (9th Cir. 2011).

[2] References to: ("GC-__") are to the General Counsel's Exhibits; ("R-__.") are to the Respondent's Exhibits; ("Tr. __.") are to the official transcript of the hearing for Case No. 2-CA-39996, held on September 21, 2011; ("ALJD") are to the Administrative Law Judge's Decision, dated November 30, 2011; and ("AGCB") are to the Acting General Counsel's Exceptions and Supporting Brief to the Board, filed on December 28, 2011.

1500 (1962), supplemented by 147 NLRB 977 (1964) and its progeny. The ALJ properly applied the law, and there is no reasoned analysis on this record that justifies overturning well-established precedent.

In addition, Acting General Counsel seeks to impose an unlawful penalty on the Respondent by attempting to recover dues, dating back to April 2010, from the employer directly.

PROCEDURAL HISTORY

Local 342 filed unfair labor practice charges against the Respondent under case numbers 2-CA-39715 and 2-CA-39996. Acting General Counsel issued a Complaint on March 31, 2011, and an Amended Complaint on May 17, 2011. On May 31, 2011, an Order Consolidating Cases and Rescheduling Hearing, and Consolidated Complaint were served. (GC-1q). The Respondent served an Answer to the Consolidated Complaint on June 13, 2011. (GC-1s).

A hearing on the Consolidated Complaint was held before the ALJ on September 21, 2011. The cases were severed and the parties submitted a Formal Settlement Stipulation for case number 2-CA-39715, which was approved by the ALJ. (GC-2; GC-3). On November 21, 2011, the Board issued a Decision and Order approving the Formal Settlement Stipulation and transferred the proceeding to the Board in Washington D.C. for entry.

The sole claim of the Complaint remained under case number 2-CA-39996 and alleged that the Respondent violated Sections 8(a)(1) and (5) by ceasing dues checkoff in April 2010. (Tr. 7:13-25). Accordingly, the Respondent's Answer to the Consolidated Complaint was withdrawn, with the exception of paragraph 13 and the Fourth Affirmative Defense. (GC-2, ¶ 3). This claim proceeded to hearing, and evidence concerning the Respondent's cessation of dues checkoff was admitted into evidence. (Tr. 6:5-9:14). Following the submission of post-hearing briefs, the ALJ issued a Decision, dated November 30, 2011, dismissing the Complaint. On December 28, 2011, Acting General Counsel served Exceptions to the ALJ's Decision and a Supporting Brief to the Board. (See generally AGCB).

FACTUAL BACKGROUND

The CBA between the Respondent and Local 342 was in effect between July 1, 2005 and October 31, 2009. (GC-4). Article 3 of the CBA was entitled "Union Security," which required: (1) that Union membership be a condition of employment for employees subject to the CBA; and (2) that the Respondent deduct dues in accordance with deduction authorization cards provided to the Respondent by Local 342:

> ARTICLE 3 – UNION SECURITY
>
> A. **It shall be a condition of employment** that all employees covered by this Agreement who are members of the Union in good standing on the execution date of this Agreement shall remain members in good standing, and those who are not members on the execution date [shall] **become and remain members in good standing of the Union**.... It shall also be a condition of employment that all employees covered by this Agreement and hired on or after it execution date shall ... become and remain members in good standing in the Union.
>
> B. **Any employee who is expelled or suspended from the Union because of non-payment of initiation fees and periodic dues** (including such other obligations to the Union which failure to pay would make an employee subject to discharge under the Labor-Management Relations Act, 1947, [as] amended) **shall be subject to dismissal ten (10) days after notification in writing to the Employer by the Union**. The Union agrees to notify members who are delinquent in the Union financial obligations and upon the failure of the member to immediately re-establish his or her good standing in the Union, his discharge will be requested.
>
> C. The Employer agrees to deduct dues and initiation fees and any other authorized amounts, **from the wages of all employees who have on file with the Employer a proper deduction card** and to remit the amount with a listing of names to the Union Office on or before the 27^{th} day of each month. The Union will give to the Employer signed deduction cards from the employees authorizing the deduction of dues and initiation fees and any other authorized amounts. **The Employers obligation to remit to the Union shall**

be limited to the amounts which it actually does deduct from the employees' wages.

(Id. at Art. 3) (emphasis added). It is undisputed that the CBA expired pursuant to its terms on October 31, 2009, and that the Respondent deducted dues from employee paychecks pursuant to Article 3 during the term of the CBA and the dues checkoff cards executed by Local 342 members.[3]

By letter dated April 1, 2010, the Respondent notified Local 342 that dues checkoff would be discontinued as of the first payroll period in April 2010.[4] (R-1). This notice was sent to Local 342 President Richard Abondolo and Executive Vice President Lisa O'Leary. (Id.) Ms. O'Leary received the notice, evidenced by her email dated April 1, 2010 which attached a copy of the April 1, 2010 letter. (R-2).

To date, Local 342 and the Respondent have not reached an agreement on a successor collective bargaining agreement.

ARGUMENT

POINT I

THE ADMINISTRATIVE LAW JUDGE CORRECTLY HELD THAT RESPONDENT'S UNILATERAL CESSATION OF DUES CHECKOFF WAS LAWFUL

The ALJ correctly held that the Respondent's "unilateral cessation of dues checkoff in April, 2010, following the expiration of the collective-bargaining agreement" between the Respondent and Local 342 "did not violate Section 8(a)(5) and (1) of the Act." (ALJD, p. 5). His conclusion rests upon the longstanding rule enunciated in Bethlehem Steel, and unequivocally supported by its progeny, that upon expiration of a collective bargaining agreement, an employer may unilaterally discontinue the collection and remittance of union dues

[3] Two samples of the dues checkoff cards were admitted into evidence as GC-5.
[4] This change was reflected in paychecks issued on April 8, 2010 and April 9, 2010. (R-1).

when the dues checkoff arrangement implements union security. Bethlehem Steel, 136 NLRB at 1502.

In applying the extant law, the ALJ properly distinguished the circumstances in this case from the Hacienda/LJEB saga, finding that "New York is not a right-to-work state, and therefore, the union security clause here may be considered, consistent with *Bethlehem Steel*, to have been properly linked with the dues checkoff provisions." (ALJD, pp. 4-5). As the ALJ noted, despite Acting General Counsel's request, he lacked the authority to overturn Bethlehem Steel, rather, the extent of his authority is to apply Board precedent to the matter at hand. (ALJD, p. 4). Acting General Counsel concedes that under Bethlehem Steel, the Respondent "may act unilaterally with respect to checkoff after the expiration of a contract because checkoff implements the union security provision of the contract..." (AGCB, p. 8).

Finally, relying on 87-10 51st Ave. Owners, 320 NLRB 993 (1996), the ALJ properly concluded that Respondent's decision to continue the collection and remittance of union dues for several months after the expiration of the CBA did not extinguish its right to discontinue that practice at a later date. (See ALJD, p. 5).

Thus, unless the Board reverses Bethlehem Steel, the Acting General Counsel's arguments that Respondent violated the Act by unilaterally discontinuing dues checkoff following the expiration of the CBA (AGCB, pp. 19-22) fails and the ALJ's recommended dismissal of the Complaint must be upheld.

POINT II

THE BOARD'S RULING IN BETHLEHEM STEEL IS BASED UPON REASONED DECISION MAKING

The Board's decision in Bethlehem Steel, as relied upon by the ALJ, was the product of reasoned decision making, thus it should be upheld.

In NLRB v. Katz, 369 U.S. 736, 747 (1962), the Supreme Court held that as a general rule, employers cannot unilaterally change terms and conditions of employment that constitute mandatory subjects of bargaining following the expiration of a collective bargaining agreement. In stating this general proposition, the Court left open the possibility that there may be instances when such unilateral action is permitted without running afoul of the Act, stating that "we do not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action." Id. at 748.

In the same year as Katz, the Board, in Bethlehem Steel, established just such an exception. Specifically, the Board held that an employer is permitted to unilaterally discontinue an expired contract's dues checkoff provision because it implemented the union security exception stated in Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3) (hereinafter "Section 8(a)(3)"). Bethlehem Steel, 136 NLRB at 1502. The Board expressed its ruling as follows:

> upon the termination of a union-security contract, the union-security provisions become inoperative and no justification remains for either party to the contract thereafter to impose union security requirements.
>
> * * *
>
> Similar considerations prevail with respect to Respondent's refusal to continue to check off dues after the end of the contracts. The checkoff provisions in Respondent's contracts with the union implemented the union-security provisions. The Union's right to such checkoffs in its favor, like its right to the imposition of union security, was created by the contracts and became a contractual right which continued to exist as long as the contracts remained in force.

Id. The Board's reasoning is correct. In creating this exception, the Board first noted that union security and checkoff are compulsory subjects of bargaining, citing its earlier decision in United States Gypsum Co., 94 NLRB 112, amended, 97 NLRB 889 (1951), modified, 206 F.2d 410 (5th Cir. 1953). In United States Gypsum, the Board overruled the Trial Examiner, noting that earlier authority disputing whether checkoff was a mandatory subject of bargaining predates the passage of the Labor-Management Relations Act. 94 NLRB at 113, n7. The Board then held that:

> [W]e are satisfied from the language and legislative history of the 1947 amendments that Congress intended that the bargaining obligation contained in Section 8(a)(5) should apply to checkoff. H.R. 3020, 89th Congress, 1st Sess., p. 10; H.R. Rep. No. 245, pp. 29, 71; H.R. Conf. Rep. No. 510 on H.R. 3020, p. 34.

Id. It is critical to note that the 1947 Amendments included both Section 8(a)(3) and Section 302(c), 29 U.S.C. 186(c)(4) (hereinafter "Section 302(c)(4)"), thus linking them in the Board's view, to establish that checkoff is a mandatory subject of bargaining. Further, and equally critical, is that the legislative history cited by the Board includes the unequivocal statement from Representative Hartley that dues checkoff is "a form of 'union security'." (H.R. Rep. No. 245, 80th Cong., 1st Sess., at 29 (1947)).

Subsequently, the Supreme Court provided a more detailed explanation of the legislative history, which makes clear that the union security provisions of Section 8(a)(3) are inextricably intertwined with dues checkoff. This history, discussed at length in Communications Workers of America v. Beck, 487 U.S. 735, 746-54 (1988), can be summarized in relevant part as follows: "Th[e] legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payments of union dues and fees.'" Id. at 749 (citing Radio Officers' Union v. NLRB, 347 U.S. 17, 41 (1954)). The Court further stated that "Congress' decision to allow union-security agreements *at all* reflects its concern that ... the parties to a collective bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them." Id. at 750 (citing Oil, Chemical and Atomic Workers Int'l Union v. Mobil Oil Corp., 426 U.S. 407, 416 (1976)). In view of this legislative history, the Board in Bethlehem Steel was on solid ground in concluding that a dues checkoff requirement in a collective bargaining agreement – which provides the union with assurance that dues will be paid automatically and on a regular basis, and the employees with assurance that they will meet the requirement of paying dues (a condition of continued employment) – implements the union security provision of the agreement. Thereafter, in NLRB v. Penn Cork & Closures, Inc., 376 F.2d 52 (2d Cir. 1967), the Second Circuit approved the Board's position that dues checkoff and union security are directly related. The court stated that:

> [t]he Board asserts that where a union shop exists under the authority of 8(a)(3), it is logical to infer that employees authorizing dues checkoffs do so under its influence. This inference is particularly compelling where, as here, the collective bargaining agreement obliges the company to dismiss a worker within three days of being notified by the union of his failure to maintain his good standing; under such an agreement an employee is likely to authorize a dues checkoff for fear that without it he may forget to make the payments and risk dismissal for failure to pay union dues.

Id. at 55.

Furthermore, the Board's position in Bethlehem Steel has been recognized, without question, by the Supreme Court in Litton Financial Printing Division v. NLRB, 501 U.S. 190, 199 (1991) (stating, "it is the Board's view that union security and dues check-off are excluded from the unilateral change doctrine because of statutory provisions which permit these obligations only when specified by the express terms of a collective-bargaining agreement") and upheld by numerous Courts of Appeal. See, e.g., Southwestern Steel & Supply, Inc. v. NLRB, 806 F.2d 1111, 1114 (D.C. Cir. 1986) ("[t]he well established exceptions for union-shop and dues-checkoff provisions are rooted in § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), and § 302(c)(4) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(4), which are understood to prohibit such practices unless they are codified in an existing collective-bargaining agreement") (citations omitted); see also McClatchy Newspapers, Inc. v. NLRB, 131 F.3d 1030 (D.C. Cir. 1997) ("[i]nsofar as dues check-off and union security clauses are exceptions to the post-impasse rule, however, it is not because the Board has authority to treat them as such; rather, the NLRA requires that these clauses be exceptions because they are legal only if authorized by a collective bargaining agreement") (citations omitted); U.S. Can Co. v. NLRB, 984 F.2d 864, 869 (7th Cir. 1993) ("Checkoff of dues and other payments from the employer to the union, like the enforcement of a union security clause, depend on the existence of a real agreement with the union").[5]

In his haste to overturn 50 years of Board precedent, the Acting General Counsel impermissibly ignores the factual record in the instant matter, which exemplifies the Board's reasoning in Bethlehem Steel. Here, the dues checkoff provision of the CBA clearly implements union security: Article 3 of the CBA, which contains the dues checkoff obligation, is entitled "Union Security." (GC-4). A plain reading of Article 3 provides no reasonable alternative interpretation of the purpose of dues checkoff other than to implement union security. Specifically, Article 3 provides in sequence that: (1) all bargaining unit employees must be members of the Union in good standing to work for the Respondent; (2) Union members who do

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[5] In addition, on numerous occasions the Board has reaffirmed its holding in Bethlehem Steel. See Teamsters Local No. 70, 197 NLRB 125, 128 (1972), enf'd per curiam, 490 F.2d 87 (9th Cir. 1973) and 525 F.2d 333 (9th Cir. 1975); Peerless Roofing Co., 247 NLRB 500, 505 (1980), enf'd, 641 F.2d 734 (9th Cir. 1981); Ortiz Funeral Home Corp., 250 NLRB 730, 731 n.6 (1980), enf'd on other grounds, 651 F.2d 136 (2d Cir. 1981); Robbins Door & Sash Co., 260 NLRB 659, 659 (1982); Petroleum Maintenance Co., 290 NLRB 462, 463 n.4 (1988); R.E.C. Corp., 296 NLRB 1293, 1293 (1989); Xidex Corp., 297 NLRB 110, 118 (1989), enf'd, 924 F.2d 245, 254–255 (D.C. Cir. 1991); AMBAC, Int'l, 299 NLRB 505, 507 n.8 (1990); U.S. Can Co., 305 NLRB 1127, 1127 (1992), enf'd, 984 F.2d 864, 869 (7th Cir. 1993); J. R. Simplot Co., 311 NLRB 572, 572 (1993), enf'd mem, 33 F.3d 58 (9th Cir. 1994); Sonya Trucking, Inc., 312 NLRB 1159, 1160 (1993), supplemented by 315 NLRB No. 79 (1994); Katz's Deli, 316 NLRB 318, 334 n.23 (1995), enf'd on other grounds 80 F.3d 755 (2d Cir. 1996); Sullivan Bros. Printers, 317 NLRB 561, 566 n.15 (1995), enf'd, 99 F.3d 1217, 1231 (1st Cir. 1996); Spentonbush/Red Star Cos., 319 NLRB 988, 990 (1995), enf'd, denied on other grounds, 106 F.3d 484 (2d Cir. 1997); 87-10 51st Ave. Ownership Corp., 320 NLRB 993 (1996); Talaco Commc'ns, Inc., 321 NLRB 762, 763 (1996); Able Aluminum Co., 321 NLRB 1071, 1072 (1996); Valley Stream Aluminum, Inc., 321 NLRB 1076, 1077 (1996); Hacienda I; West Co., 333 NLRB 1314 (2001).

not fulfill their financial obligations to the Union are not in good standing and subject to discharge; and (3) employees can ensure their "good standing" by participating in the dues checkoff arrangement the Union bargained for, and included within, the CBA's union security framework. (GC-4). The explicit and comprehensive connection between dues checkoff and union security clearly demonstrates that the dues checkoff provision implements, and is inseparable from, the CBA's union security clause.

POINT III

ACTING GENERAL COUNSEL FAILS TO ESTABLISH ANY BASIS FOR OVERTURNING BETHLEHEM STEEL

Acting General Counsel makes three arguments in support of his request that the Board reverse its ruling in Bethlehem Steel: (A) that under the Supreme Court's ruling in Litton Financial Printing Division v. NLRB, 501 U.S. 190 (1991), the Board may find that a clause in a collective bargaining agreement does not survive contract expiration only if the language of the statute prohibits it or if the clause involves the surrender of a statutory right. (AGCB, pp. 12, 16-19); (B) that checkoff clauses are not union security provisions and therefore cannot implement union security; and (C) that Section 302(c)(4) allows checkoff to survive expiration of a contract. (AGCB, pp. 14-16). Acting General Counsel's arguments are illogical, unsupported by the authorities cited and completely without record support.

A. Acting General Counsel Misinterprets the Supreme Court's Ruling in Litton

Acting General Counsel cites Litton for the proposition that mandatory subjects of bargaining expire with a collective bargaining agreement *only if* "(1) the statute does not permit such provisions to survive..., or (2) such provisions compel a party to surrender a statutory right." (AGCB, p. 11). Contrary to Acting General Counsel's claim, a proper reading of the

Supreme Court's decision in Litton makes clear that the Court placed no such restrictions on the Board's authority. In Litton, the Court described the Board's authority as follows:

> The unilateral change doctrine, and the exclusion of arbitration from the scope of that doctrine, represent the Board's interpretation of the NLRA requirement that parties bargain in good faith. And "[i]f the Board adopts a rule that is rational and consistent with the Act . . . then the rule is entitled to deference from the courts." Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987).

Litton, 501 U.S. at 200. In no way does the Court limit the Board's authority to determine which provisions of a collective bargaining agreement survive contract expiration to those which are expressly prohibited by statute or involve a waiver of a statutory right.

Acting General Counsel's argument that dues checkoff survives the expiration of a collective bargaining agreement because "parties do not give up statutory rights they would otherwise have" is irrelevant. (AGCB, pp. 16-19). As stated above, the Board's authority to determine what fits under the Katz unilateral change doctrine is not limited to those instances where the party gives up a statutory right.

B. Acting General Counsel Fails to Establish that Dues Checkoff Clauses Do Not Implement Union Security

Acting General Counsel argues that union security clauses and dues checkoff clauses serve different purposes and may exist independently of one another. (AGCB, p. 12). From this argument, he draws the unwarranted conclusion that checkoff does not implement union security. In his effort to divorce dues checkoff from union security, Acting General Counsel incorrectly paraphrases a study conducted by the Bureau of National Affairs (AGCB, p. 13) and a number of decisions by the Board and reviewing Courts of Appeal. None of the cited authority supports Acting General Counsel's position.

To begin, the fact that the Act does not formally link dues checkoff and union security is immaterial. As noted above, Congress provided the Board with broad discretion to interpret the Act. That discretion is limited only by their duty to adopt rules that are "rational and consistent with the Act." Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987) (citation omitted). The legislative history cited above (Point II, supra, p. 7) makes clear that Congress intended that union security provisions would have the purpose of making sure that all employees paid for union representation. Checkoff clauses, as exemplified by the one at issue here, implement that purpose by providing a mechanism through which dues are paid regularly, thereby ensuring an employee's good standing with the union and continued employment. See Penn Cork & Closures. Therefore, the Board clearly did not abuse its authority to interpret the Act by excluding dues checkoff from the unilateral change rule enunciated in Katz.

The chapter entitled "Union Security" in Basic Patterns in Union Contracts (14th ed. 1995) upon which Acting General Counsel relies, should not be considered because it is not in the record herein. Even if the Board were to examine the document, the authors of the study expressly acknowledge the proposition that the Respondent asserts throughout this Brief: that "[u]nion security provisions includ[e] check-off" and hiring arrangements. Id. at 97. Similarly, Acting General Counsel neglected to include the book's own cautions concerning use of the studies reported therein. (Id.) The authors advise that the findings are based on only 400 collective bargaining agreements from a variety of manufacturing and non-manufacturing industries. Basic Patterns in Union Contracts, at v-vi. The statistics cited by Acting General Counsel (see AGCB, pp. 12-13) are not reliable in this context because: (1) the study concedes that its results and totals include contracts from both right-to-work and non right-to-work states and no attempt is made to distinguish the findings based on that factor, which could well explain the discrepancy between the number of contracts with union security clauses and the number

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with checkoff; and (2) the Respondent's industry (wholesale meat distribution) is not included among the industries studied. Id. at 97-100.

Acting General Counsel inaccurately cites Shen-Mar Food Products, Inc., 221 NLRB 1329, 1330 (1976), enf'd in relevant part, 557 F.2d 396 (4th Cir. 1977) for the proposition that "dues checkoff is not a union security device since it does not impose union membership as a condition required for employment." (AGCB, p. 13). Far from pronouncing such a broad statement, the Board in Shen-Mar Food Products simply stated that "the dues checkoff herein does not, in and of itself, impose union membership or support as a condition required for continued employment." Shen-Mar Food Products, 221 NLRB at 1330. This ruling is consistent with Bethlehem Steel, which held that checkoff implements union security, not that it imposes it. Additionally, Acting General Counsel conveniently leaves out the fact that Shen-Mar Food Products arose in a right-to-work state, thereby ensuring, as a matter of state law, that dues checkoff does not implement union security in that case.

Furthermore, Shen-Mar Food Products is inapposite to the instant matter because it concerns the discontinuance of dues checkoff during the term of a valid collective bargaining agreement. 221 NLRB at 1330. As a result, the Board in Shen-Mar Food Products considered far different legal and factual questions than those before the Board in the instant matter. In fact, neither the Board nor the ALJ in Shen-Mar Food Products even mentioned Bethlehem Steel, let alone relied upon it as a basis for their decision. In the instant matter, the Respondent and the Union, acting in a non right-to-work state, negotiated a collective bargaining agreement in which they included dues checkoff as a part of the Article implementing union security.

Similarly, Acting General Counsel states that "dues-check-off provisions can and frequently do exist in collective-bargaining agreements where union security provisions are absent" (AGCB, p. 12), and cites NLRB v. Atlanta Printing Specialties and Paper Products Union 527, 523 F.2d 783, 786 (5th Cir. 1975) for the proposition that "the Act makes no formal relationship between the two devices." (AGCB, pp. 12-13). These arguments are likewise unavailing. *First*, the fact that dues checkoff can exist absent union security does not mean that dues checkoff does not implement union security where both exist. A plain reading of the CBA here, makes this connection obvious. *Second*, Atlanta Printing did not involve the employer's right to unilaterally cease dues checkoff after the expiration of a collective bargaining agreement, but rather, at issue was whether employees had timely revoked their dues checkoff authorizations in a right-to-work state. Atlanta Printing, 523 F.2d at 785. Therefore, any of the court's broad statements regarding dues checkoff and union security must be read in light of those circumstances, which are not present in the instant case.

Lastly, Acting General Counsel relies on American Nurses Association, 250 NLRB 1324 (1980) in support of the argument that dues checkoff does not impose union security. Specifically, Acting General Counsel contends that "revocation of checkoff is not tantamount to resignation from the union and resignation from a union does not revoke checkoff." (AGCB, p. 13). As previously stated, this argument is unavailing for the simple fact that the Board in Bethlehem Steel did not suggest that dues checkoff survives the contract because it imposes union security. Rather, the Board logically concluded that dues checkoff implements union security and that is certainly the case in the instant matter, which arises in a non right-to-work state. Furthermore, as with the other cases cited by the Acting General Counsel, the Board's conclusion in American Nurses Association is inapplicable to the instant matter because it concerns an employee's attempted revocation of a dues checkoff authorization outside of the applicable revocation period, not with the permissibility of an employer's decision to unilaterally discontinue dues checkoff following the expiration of a collective bargaining agreement. American Nurses Ass'n., 250 NLRB at 1331.

Based on the foregoing, Acting General Counsel's conclusion that checkoff clauses do not implement union security is completely unfounded and illogical. (AGCB, pp. 12-16). Acting General Counsel ignores the factual record herein and presents generalized arguments without any supporting record evidence to justify his request that the Board overturn such a longstanding and reasonable interpretation of the Act.

C. Section 302(c)(4) Does Not Prevent an Employer from Unilaterally Discontinuing Dues Checkoff After the Expiration of a Collective Bargaining Agreement

To the extent the Acting General Counsel alleges that Section 302(c)(4) precludes the Board from concluding that dues checkoff expires with the collective bargaining agreement (see AGCB, pp. 14-16), he is simply incorrect. As an initial matter, there are two requirements that must be met before an employer can lawfully check off union dues on behalf of their employees. First, the employer and union must agree to include a dues checkoff provision in their collective bargaining agreement. Second, after the parties agree to include dues checkoff in their collective bargaining agreement, an employer may check off dues only after the employee signs a dues checkoff authorization that meets the requirements of Section 302(c)(4). If either of these factors is not present, an employer has no duty to check off dues. The Board in Bethlehem Steel did not rely on Section 302 to justify its holding. Rather, the Board examined the employer's right to unilaterally discontinue dues checkoff after the expiration of the collective bargaining agreement purely through the lens of Section 8(a)(3).

The fact that Section 302(c)(4) does not provide for automatic expiration of dues checkoff upon contract expiration does not govern the issue of whether the employer's duty to check off continues. Rather, Section 8(a)(3) governs the employer's responsibilities in that regard. Bethlehem Steel, 136 NLRB at 1502. By ruling that an employer does not violate the Act by discontinuing checkoff after contract expiration, the Board does not render Section 302(c)(4) meaningless. The Board has also recognized the employer's right to agree to continue checkoff during post-expiration negotiations. See Lowell Corrugated Container Corp., 177 NLRB 169, 173 (1969) ("a checkoff authorization which has not been revoked... may be honored during its term by the Employer involved notwithstanding that the contract sanctioning the authorization has expired"), enf'd, 431 F.2d 1196 (1st Cir. 1970); see also 87-10 51st Ave. Owners Corp. In such circumstances, an employee would be able to exercise his or her right under Section 302(c)(4) to revoke a checkoff authorization.

Acting General Counsel's reliance upon Senator Taft's statement that under Section 302, checkoff authorization "may continue indefinitely until revoked" (AGCB, p. 14, citing Legislative History of the Labor Management Relations Act 1947, Volume II, at 1311 (NLRB 1948)) is misplaced for the same reason.

Since Acting General Counsel completely fails to establish any support for his claim that Bethlehem Steel, as applied in states that have not adopted right-to-work legislation, was wrongly decided, his request that the Board now reverse that decision should be denied.

POINT IV

THE BOARD SHOULD HONOR THE DOCTRINE OF STARE DECISIS AND NOT OVERTURN LONGSTANDING PRECEDENT WITHOUT A COMPELLING JUSTIFICATION

The Board's ruling in Bethlehem Steel has stood for fifty years. In his concurrence to Levitz Furniture Company of the Pacific, Inc., 333 NLRB 717 (2001), Member Hurtgen stated that longstanding Board precedent should not be overturned unless there is a "clear showing that extant law is contrary to statutory principles, disruptive to industrial stability, or confusing." Id. at 731. These factors are not present in the instant matter.

The Board's longstanding commitment to the rule enunciated in Bethlehem Steel is evidence enough that the rule is not contrary to statutory principles, and comports with the language of the legislative history to the 1947 Amendments to the Act, which expressly links dues checkoff and union security. (See Point II, supra, at pp. 6-7). Given the Board's long term commitment to the decision, and the numerous decisions of reviewing courts affirming the Board's interpretation, overturning the decision on the theory that it is unsupported by statutory principles is unjustified.

Discontinuance of dues checkoff following contract expiration does not promote industrial strife, and is a clear and rational interpretation of the statute. The Board's longstanding commitment to Bethlehem Steel has served as an uncommonly steady guide to parties negotiating collective bargaining agreements. To the contrary, a decision to overturn Bethlehem Steel is likely to be disruptive of industrial relations, as parties to collective bargaining agreements would then negotiate in the face of a wholly new doctrine concerning dues checkoff. It may well be that employers will be less willing to agree to checkoff clauses if they cannot ultimately cease checkoff following contract expiration during subsequent bargaining.

Finally, the rule enunciated in Bethlehem Steel is not confusing. As evidenced by the many cases citing Bethlehem Steel, it is commonplace that parties to collective bargaining agreements recognize that the unilateral discontinuance of dues checkoff after the expiration of a contract is valid under the law. See In re Bulkmatic Transportation Co., 340 NLRB 621, 625 (2003) ("the parties do not dispute the well-established precedent that an employer's obligation to continue a dues-check-off arrangement expires with the contract that created the obligation").

POINT V

ACTING GENERAL COUNSEL'S PROPOSED REMEDIES SHOULD BE DENIED

A. Acting General Counsel's Request for Retroactive Application of the New Rule He Seeks to Enforce Should be Denied

In the event that the Board reverses its long-standing rule, it should deny the Acting General Counsel's request that the new rule be applied retroactively and that Nebraskaland "pay the Union the dues that should have been checked off as off[sic] the first pay period in April 2010." (AGCB, p. 23).

In Levitz Furniture Company of the Pacific, Inc., 333 NLRB 717 (2001), the Board reversed its long-standing legal standard regarding unilateral withdrawal of recognition. The Board expressly declined to implement the new standard retroactively because employers did not have "adequate warning" of the change in the Board's position. Id. at 729. The Board should apply the same rationale here, where, if the Board reverses Bethlehem Steel, it will be declaring conduct, which it has held for fifty years to be permissible, newly constitute an unfair labor practice. Certainly, Nebraskaland is entitled to "adequate warning" of such a momentous reversal of established law.

Further, the Board will not apply an arguably new rule retroactively to the parties in the case where the new rule is announced if to do so will work a "manifest injustice." SNE Enters., Inc., 344 NLRB 673 (2005). In determining whether retroactive application of a new rule will cause manifest injustice, the Board balances three factors:

1. the reliance of the parties on preexisting law;
2. the effect of retroactivity on accomplishment of the purposes of the Act; and
3. any particular injustices arising from retroactive application.

Id. at 673. Examination of these three factors in the instant case leads to the inescapable conclusion that retroactive application of the new rule would create manifest injustice.

i. The Ruling Sought By Acting General Counsel Would Create a "New Rule"

In 1962, the Board clearly ruled, "Consequently, when the contracts terminated, Respondent was free of its checkoff obligations to the Union." Bethlehem Steel, 136 NLRB at 1502. In the intervening fifty years, the Board and reviewing courts have followed this ruling to find that an employer does not violate the Act by unilaterally ceasing dues checkoff after its agreement with a union expires. See e.g., Southwestern Steel; Wilkes Tel. Membership Corp., 331 NLRB 823 (2000); and decisions cited at p. 9 n.5, supra. In the instant case, Acting General Counsel plainly seeks to reverse that long-standing rule and make such a unilateral action a violation of Section 8(a)(5) of the Act. Clearly, if the Board were to reverse its ruling in Bethlehem Steel it would be creating a "new rule."

ii. Nebraskaland Relied Upon the Law in Effect at the Time It Stopped Dues Checkoff

There is no dispute that the CBA expired on October 31, 2009. By letter dated April 1, 2010, Nebraskaland notified the Union in part as follows:

> The collective bargaining agreement between Nebraskaland, Inc. and UFCW having expired October 31, 2009, Nebraskaland is discontinuing the dues checkoff and union security provisions that do not survive contract expiration.

(R-1). Clearly, Nebraskaland, by setting forth in its notice to the Union the very rationale relied upon by the Board in Bethlehem Steel, established that it was specifically relying on the ruling in that decision in discontinuing dues checkoff.

Acting General Counsel argues that Nebraskaland could not rely on the Board's decision in Bethlehem Steel because the "Hacienda/LJEB" line of cases put the law regarding unilateral changes in checkoff in flux since 2002 (AGCB, p. 24), and, in particular, points to the split decision of the Board in Hacienda III and to the decision of the Ninth Circuit Court of Appeals in LJEB III. (Id.) Acting General Counsel's argument is fatally flawed because despite the extensive litigation of the "Hacienda/LJEB" cases, the Board, to date, has not reversed its earlier ruling in Bethlehem Steel.

In both Hacienda I and II, a majority of the Board upheld Bethlehem Steel. Thus, in April 2010, when Nebraskaland ceased its checkoff of dues, Bethlehem Steel remained in effect. The fact that two members of the Board dissented simply cannot be considered "adequate warning" of a change in Board law. Hacienda III was decided on August 27, 2010, four months after Nebraskaland ceased the checkoff of dues. Furthermore, in Hacienda III, although two members of the Board expressed a willingness to overturn Bethlehem Steel, two other members of the Board expressed support for Bethlehem Steel. In conclusion, the Board ruled:

> In view of this deadlock, we have determined to follow existing precedent and affirm the administrative law judge's recommended Order disposing the complaint.

355 NLRB No. 154, No. 2010 WL 3446120, at *2. Thus, to date, the Board has not reversed Bethlehem Steel, and Nebraskaland's reliance on it weighs against retroactive application of the new rule.

The decisions of the Ninth Circuit in the Hacienda/LJEB line of cases are limited to the application of Bethlehem Steel in right-to-work states. As the court noted:

> the question squarely in front of the Board is whether dues-checkoff in right-to-work states is subject to unilateral change, or whether, under such circumstances, dues-checkoff is a mandatory subject of bargaining.

LJEB III, 657 F.3d at 870 (citing LJEB II, 540 F.3d at 1075). The instant case arose in New York, which is not a right-to-work state. Therefore, the Ninth Circuit's decisions provided no notice to Nebraskaland that Bethlehem Steel, as applied in a non right-to-work state, was being questioned by a reviewing court. Further, LJEB III was decided on September 13, 2011, well over a year after Nebraskaland ceased checking off dues, and its ruling is expressly limited to the application of Bethlehem Steel in right-to-work states. LJEB III, 657 F.3d at 876 ("we conclude that in a right-to-work state, where dues-checkoff does not exist to implement union security, dues-checkoff is akin to any other term of employment that is a mandatory subject of bargaining"). Even in so ruling, the court specifically stressed that, "because the NLRA is ambiguous on this issue, the Board may adopt a different rule in the future, provided of course that such a rule is rational and consistent with the NLRA." Id. Thus, the court left open the possibility that the Board may yet develop a rationale acceptable to the court for applying Bethlehem Steel in right-to-work states.

iii. Retroactive Enforcement of a New Rule Would Not Significantly Support Accomplishment of the Purposes of the Act

Acting General Counsel, in attempting to distinguish the dues checkoff obligation from the union security obligation under a collective bargaining agreement states that, "[t]he checkoff portion of a contract is an administrative convenience," and that "the absence of the check-off obligation would merely be an inconvenience forcing an employee to make other arrangements for dues payments." (AGCB, p. 15). Acting General Counsel's argument highlights the fact that Nebraskaland's action in stopping dues checkoff did not terminate either the Union's right to collect dues from employees, or the employees' obligation to pay those dues. Thus, declining to retroactively apply the new rule sought by Acting General Counsel would at most have a marginal effect on accomplishing the Act's purposes, which is not sufficient to support retroactive enforcement. Cf. Wal-Mart Stores, Inc., 351 NLRB 130, 135 (2007).

Further, retroactive enforcement of dues checkoff may well frustrate employees' rights under the Act. Since the collective bargaining agreement has expired, each employee who has executed a dues checkoff authorization has the right, under Section 302(c)(4), to revoke that authorization. Nebraskaland's action in discontinuing the checkoff made such action by employees unnecessary. To now enforce the checkoff retroactively would effectively deny to the employees the right to revoke their checkoff authorization for the period of time from April 2010 to a date the Board might gain an enforceable position.

Thus, this factor weighs heavily against retroactive enforcement.

iv. Retroactive Application of a New Rule Would Cause a Particular Injustice to Nebraskaland

Acting General Counsel seeks an Order not only applying a new rule retroactively, but also directing that Nebraskaland pay to the Union the dues that should have been deducted during that retroactive period. (AGCB, p. 23).

Acting General Counsel argues that it is "well-established" that the Board requires an employer to reimburse the union for dues checkoff payments that it failed to make. However, the sole authority cited by Acting General Counsel is inapposite to the circumstances herein. In Heartland Health Care Center, 341 NLRB 363 (2004), the Board upheld an ALJ's finding that the employer had improperly withdrawn recognition of a union during the existence of a valid collective bargaining agreement, and ordered that the employer pay the union the dues that it did not withhold as a result. Id. at 363. There was no issue as to whether the employer's actions were permissible under Board law at the time, and thus the decision is of no relevance to the issue of retroactive application herein. Acting General Counsel cites no authority for imposing a requirement that an employer itself pay dues to the union where, as here, its action in ceasing dues checkoff was permitted under Board law in effect at the time it stopped checking off dues.

The Court of Appeals for the District of Columbia has ruled that in considering whether to give retroactive application to a new Board rule substituted for old law, the new rule may justifiably be given prospective-only effect in order to protect the settled expectations of those who had relied upon the preexisting rule. Epilepsy Found. of Northeast Ohio v. NLRB, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (citing Pub. Serv. Co. of Colo v. FERC, 91 F.3d 1478, 1488 (D.C. Cir. 1996). In Epilepsy Foundation, the Board had found that Weingarten rights are available in non union workplaces and sought to extend these rights retroactively to provide a basis for ordering reinstatement and back pay to an employee who sought to exercise this right at a time that it did not exist in a non union workplace. The Court held that in the circumstances of Epilepsy Foundation, "'notions of equality and fairness'" mitigate strongly against retroactive application of the Board's substitution of new law for old law that is reasonably clear. It further concluded that it would be a "'manifest injustice'" to require the employer to pay damages to an employee who, without legal right, flagrantly defied his employer's lawful instructions. Epilepsy Foundation, 286 F.3d at 1102-03 (citation omitted). Similar consideration should prevail here. The Board's rule in Bethlehem Steel is absolutely clear: when collective a bargaining agreement expires, an employer may unilaterally cease dues checkoff without violating the Act. The rule is well recognized and has been followed by the Board and reviewing courts for fifty years. (See Point II, supra, pp. 8-9) There is no way that Nebraskaland could have known for sure, when it ceased checking off dues in April 2010 (or even now as this brief is submitted), that the Board would reverse the rule. Further, in the instant case, after checkoff ended, the Union had the right to collect the dues directly from the employees. In such circumstances, it would be manifestly unjust to impose a financial penalty on Nebraskaland by requiring that it pay the dues to the Union.

Acting General Counsel clearly recognizes that the dues at issue are a financial obligation of the employees to the Union, not an obligation of Nebraskaland (AGCB, p. 15). Thus, requiring Nebraskaland to pay this obligation would be the imposition of a penalty, which the Board may not impose. In 1938, the Supreme Court ruled that Section 10(c) of the Act, 29 U.S.C. § 160(c), did not confer punitive jurisdiction on the Board, and that the Board was not free to inflict upon an employer any penalty it may choose. Consolidated Edison Co. of New York v. NLRB, 305 U.S. 197, 235 (1938). Later reviewing courts have followed this ruling. See, e.g., Unbelievable, Inc. v. NLRB, 118 F.3d 795, 805-806 (D.C. Cir. 1997) (Board award of litigation costs found to be punitive in nature); Morrison-Knudsen Co. v. NLRB, 275 F.2d 914, 918 (2d Cir. 1960) (Board order directing that employer refund to present and former employees fees improperly collected by a hiring hall found to be harsh and penal in nature and to go beyond merely effectuating the policies of the Act). In Ogle Protection Services, Inc., 183 NLRB 682 (1970), enf'd, 444 F.2d 502 (6th Cir. 1971), the Board affirmed the ruling of the Trial Examiner in which he refused to order that dues that the employer failed to checkoff be paid out of the employer's pocket, and instead directed dues be offset against back pay due the employees, in effect, directing that the dues deduction be made. The Trial Examiner based his decision in part on his conclusion that ordering the employer to pay the dues would be impermissibly punitive. 183 NLRB at 690. Here, requiring Nebraskaland to pay an obligation owed by its employees would penalize Nebraskaland, unjustly enrich its employees, and would not effectuate the policies of the Act. Therefore, it is punitive in nature and should not be enforced.

Acting General Counsel mistakenly relies on Southwestern Steel and Supply, Inc. 806 F.2d 1111 (D.C. Cir. 1986), to support his argument that requiring Nebraskaland to pay the dues itself is not a prohibited penalty. (AGCB, p. 24). Southwestern did not involve a reversal of long-standing Board precedent that justified the employer's actions at the time they were taken, nor did it involve retroactive application of a new rule. The Board did not direct that the employer pay dues to a union from its own funds. It merely involved a make-whole remedy for employees who lost employment opportunities when the employer unilaterally ceased using a union hiring hall upon expiration of its agreement with the union. The reviewing court found that the relief was a reasonable way to compensate those who had been harmed by the company's actions. The court noted that the company had not suggested alternative remedies. Here, as Acting General Counsel recognizes, the Union and the employees have the ability to make "other arrangements" for the collection and payment of dues. (AGCB, p. 15). Further, the Board, as described below, has the alternative, which it has exercised in other cases, to order retroactive dues deductions. Therefore, no harm requiring this remedy can be alleged to have occurred as the result of the Nebraskaland's actions.

Acting General Counsel argues, without any record support, that the employees cannot "realistically" be expected to pay the retroactive dues. (AGCB, p. 24). Acting General Counsel cites no authority for predicating relief on such a basis, and ignores a recent Board Decision in which the Board ordered a remedy that included retroactively deducting dues for a two year period. Bebley Enters., 356 NLRB No. 64 (2010). In view of the Board's ruling in Bebley Enterprises, Acting General Counsel's claim that there is no reasonable way to remedy the alleged violation other than by having Nebraskaland pay the Union dues that it purported should have checked off is plainly wrong.

In addition, Acting General Counsel ignores the inevitable alternatives that at least some of the employees already have paid the dues directly to the Union, and those who have not have enjoyed the use of the money for the intervening time. In either case, it would be manifestly unjust to allow the Union or the employees to enjoy the windfall that would result from ordering Nebraskaland to make the payments.

Thus, this factor weighs heavily against retroactive enforcement of the new rule.

B. The Acting General Counsel's Request for an Order that Nebraskaland Reinstate Checkoff Should Be Denied

Acting General Counsel asks the Board to issue an Order requiring, inter alia, that Nebraskaland reinstate dues checkoff for those employees who previously had their dues checked off and who have not revoked their checkoff authorization. (AGCB, p. 23). The Board may not issue such an Order because doing so would impose upon Nebraskaland a contractual term to which it has not agreed.

There is no statutory requirement that an employer checkoff dues and remit them to the union representing its employees. Therefore, an employer may be compelled to do so only if it has agreed to do so by contract.

In the instant case, Nebraskaland agreed, in its collective bargaining agreement, to checkoff dues for those employees who supplied properly executed dues authorization cards. (GC-4). That agreement became effective on July 1, 2005 and expired on October 31, 2009. (GC-4, Art. 40). Under the Board's ruling in Bethlehem Steel, in effect both when that agreement was negotiated and when it expired, the dues checkoff clause expired with the CBA on October 31, 2009. The Board recognizes that

> It is axiomatic that contract negotiations occur in the context of existing law, and, therefore, a contract provision must be read in light of the law in existence at the time the agreement was negotiated.

Hacienda I, 331 NLRB at 667. (citations omitted). The inescapable conclusion here is that Nebraskaland agreed only to a dues checkoff clause that terminated with the CBA, thus reserving to Nebraskaland the right to cease dues checkoff once the CBA expired.

Acting General Counsel now asks the Board to retroactively change the state of the law under which this contract was negotiated. By ruling now that in 2005 the dues checkoff clause created a term or condition of employment that must be continued after the collective bargaining agreement expires, the Board would be depriving Nebraskaland of the opportunity to decide whether or not it would agree to a checkoff clause under that condition. Such an order would violate one of the fundamental policies of the Act, freedom of contract, recognized by the United States Supreme Court in H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970). In H.K. Porter, the Board had ordered the employer, who had refused to do so in negotiations, to agree to a dues checkoff clause as a remedy for bargaining in bad faith. The Court specifically held that the Board is without power to compel either a union or employer to agree to any substantive provision of a collective bargaining agreement, in particular, a dues checkoff provision. 397 U.S. at 102.

In the instant case, the Board, by applying a reversal of Bethlehem Steel retroactively to Nebraskaland, would likewise be violating the fundamental principle of freedom of contract by writing a term and condition to into the CBA which has not been negotiated or agreed upon.

Thus, should the Board reverse its ruling in Bethlehem Steel, in order to preserve Nebraskaland's freedom of contract, its application must be limited to collective bargaining agreements that are negotiated after the new ruling is announced, which in the instant case would be the next agreement reached between the parties.

POINT VI

THE BOARD IS CURRENTLY WITHOUT AUTHORITY TO RULE ON ACTING GENERAL COUNSEL'S EXCEPTIONS

The Act establishes the NLRB as a five member board. 29 U.S.C. § 153(a). Under Section 3(b), the power of the Board may be delegated to three members as a quorum. 29 U.S.C. § 153(b); New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635, 2638-40 (2010) ("Interpreting the statute to require that Board's powers to be vested at all times in a group of at least three members is consonant with the Board quorum requirement, which requires three participating members 'at all times' for the Board to act"). Once the Board's membership drops below three, it is no longer vested with the power of the Board, and no longer able to act. New Process Steel, L.P., 130 S. Ct. at 2640 (finding that Section 3(b) requires "that the delegee group maintain a membership of three in order for the delegation to remain valid"); NLRB v. County Waste of Ulster, LLC, ___ F.3d ___, 2012 WL 28829, at *2 (2d Cir. 2012) (stating that Section 3(b) of the Act "does not permit a two member panel of the Board to decide a case when the Board itself consists only of two members") (citation omitted).

In 2011, the Board consisted of members Brian E. Hayes, Chairman Mark Gaston Pearce, and Craig Becker. (See www.nlrb.gov, "Board Members Since 1935", *available at* http://nlrb.gov/who-we-are/board/board-members-1935 (last visited January 24, 2012.)) As of January 3, 2012, however, Member Becker's term expired and only two members remained. (Id.) Two members are without authority to act with the power of the NLRB, or overrule precedent. Hacienda III, 355 NLRB No. 154, 2010 WL 3446120, at *3 ("It is the tradition of the Board that the power to overrule precedent will be exercised only by a three-member majority of the Board." (Liebman and Pearce, concurring)); New Process Steel, L.P., 130 S.Ct. at 2645 ("If Congress wishes to allow the Board to decide cases with only two members, it can easily do so.

But until it does, Congress' decision to require that the Board's full power be delegated to no fewer than three members, and to provide for a Board quorum of three, must be given practical effect rather than swept aside in the face of admittedly difficult circumstances.") Consequently, the Board, as presently constituted, may not consider or issue a ruling on Acting General Counsel's Exceptions. Decisions issued by a two member panel were vacated in the wake of New Process Steel. See County Waste of Ulster, LLC, 2012 WL 28829, at *1 (vacating the Board's February 2009 decision because it was issued by a two member panel); St. George Warehouse, Inc. v. N.L.R.B., 394 F. App'x 902, 902 (3d Cir. 2010) (vacating a November 2008 Decision and Order because the two-member panel was without "authority to enter a decision and order").

On January 4, 2012, President Barack Obama announced the appointment of three new members to the NLRB by way of "recess appointments." (See www.nlrb.gov, "White House announces recess appointments of three to fill Board vacancies," *available at* http://nlrb.gov/news/white-house-announces-recess-appointments-three-fill-board-vacancies (last visited January 24, 2012.)) Under Article II, Section 2 of the United States Constitution, the President has the "power to fill up all vacancies that may happen during the recess of the Senate." U.S. Const. Art. II, Section 2 ("Recess Clause"). The Senate, however, was not in recess when these appointments were made. See Daily Digest, Resume of Congressional Activity, Congressional Record of the 112th Congress, at D2-3 (Jan. 3, 2012). Thus, they were unconstitutional and have no effect on the quorum requirement required by the Act.

The President's attempts to circumvent the recess requirement of the Recess Clause are stymied by his own administration. The Department of Justice has opined that a recess must be longer than 3 days for a recess appointment to be valid. During oral argument before the Supreme Court on March 23, 2010, Neal K. Katyal, Deputy Solicitor General represented that "the recess appointment power can work in – in a recess. I think our office has opined the recess has to be longer than 3 days."[6] See New Process Steel, L.P. v. NLRB, Case 08-1457, pg. 50:3-5 (U.S. Mar. 23, 2010). For these reasons, the Board's membership remains at two, and cannot act until another member is properly appointed.

CONCLUSION

For the reasons set forth herein, the Respondent Nebraskaland, Inc. respectfully requests that Acting General Counsel's Exceptions be dismissed in their entirety and the Administrative Law Judge's November 30, 2011 Decision be affirmed.

Dated: January 24, 2012
New York, New York

Respectfully submitted,

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[6] The Department of Justice has recently attempted to backtrack from these statements. Nonetheless, the agency acknowledges the risk of the NLRB appointments made while the Senate convened in pro forma sessions because "[t]he question is a novel one." *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, The United States Department of Justice, Office of Legal Counsel, Jan. 6, 2012 *available at*, http://www.justice.gov/olc/memoranda-opinions.html (last visited January 24, 2012).

CERTIFICATE OF SERVICE

I, Michael F. McGahan, an attorney admitted to practice in the State of New York, hereby certify, under penalty of perjury, that on January 24, 2012 I caused a true copy of the attached Nebraskaland, Inc.'s Answering Brief to the Acting General Counsel's Exceptions to be served by overnight delivery (Federal Express) upon:

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